IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944.

O. C. TOMKINS, *Petitioner,*
v.
THE STATE OF MISSOURI, *Respondent.*
NO. 64.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT.

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STATEMENT.

Petitioner, O. C. Tomkins, filed his petition for habeas corpus in the Supreme Court of Missouri on March 16, 1944. Leave was granted to file this petition in forma pauperis and the court after a consideration of the petition at its conference en banc on April 3, 1944, declined to issue the writ for the reason that the petition did not state facts sufficient to constitute a cause of action. Petitioner did not request leave to amend his petition in the Supreme Court of Missouri. He filed his petition for certiorari in this Court on April 24, 1944, and the writ was granted on June 12, 1944.

SUMMARY OF ARGUMENT.

I.

Petitioner did not exhaust his remedies in the state courts inasmuch as he did not ask leave to amend his petition after the court had ruled it did not state a cause of action. The decision in the state court is not a final judgment from which certiorari will lie.

II.

The petition does not state a cause of action since it does not allege that petitioner was unable to employ counsel or that he requested the court to appoint counsel, which is necessary under the statutes of Missouri before a court is required to appoint counsel.

(a) The Sixth Amendment of the Federal Constitution does not apply to the states.

(b) Since the allegations in the petition do not state grounds sufficient to require the allowance of counsel under the Missouri statute, the Court was justified in ruling that the petition does not state a cause of action. Any question as to the constitutionality of the statute cannot be decided here since the petitioner did not raise it in the state court and that court therefore did not have an opportunity to pass on it.

III.

Petitioner pled guilty to the charge in the state court and did not take an appeal. He could have raised the question of denial of counsel on appeal. Habeas corpus does not take the place of a writ of error or appeal.

(a) The petitioner attempted to bring up a question that could have been decided on appeal and stated no facts or circumstances which would have required the court to grant habeas corpus.

ARGUMENT.

I.

Petitioner here did not exhaust his remedies in the state court inasmuch as he did not ask leave to amend his petition in the Supreme Court of Missouri. The decision in the State Court is not a final judgment from which certiorari will lie.

When the Supreme Court of Missouri denied petitioner's application on the ground that it failed to state a cause of action, petitioner immediately filed his petition for certiorari in this court. He did not ask leave to amend his petition. Petitioner clearly, therefore, did not exhaust his remedies in the state courts and he has not obtained a decision on the merits in the state court.

As was said by this Court in United States ex rel. Kennedy v. Tyler, 70 L. Ed. 138:

> "In the regular and ordinary course of procedure the power of the highest state court in respect of such questions should first be exhausted. When this has been done the authority of this court may be invoked to protect a party against any adverse decision involving a denial of a federal right properly asserted by him."

Also in Mooney v. Holohan, 294 U. S. 103, 55 S. Ct. 340, 79 L. Ed. 791, 98 A. L. R. 406 the Court states:

> "Orderly procedure governed by principles we have repeatedly announced, requires that before this court is asked to issue a writ of habeas corpus in the case of a person held under a state commitment, recourse should be had so whatever judicial remedy afforded by the State may still remain open."

In Flansburg v. Kaiser, 54 F. Supp. 423, the court held that where the petition for habeas corpus, on the

ground that petitioner was deprived of his liberty without due process because he had been denied assistance of counsel prior to his conviction, disclosed that a similar application had been denied by the State Supreme Court for failure to state a cause of action but did not disclose that petitioner had made an effort to amend his petition filed with the state court, the petition was denied for failure to disclose that petitioner had exhausted his state remedies.

A "*final judgment or decree*" only, of a state court may be reviewed by the Supreme Court on approval or by certiorari. (28 U. S. C. A. Sec. 341.) The decision of the Supreme Court of Missouri was in the nature of a decision on a demurrer to the petition and did not constitute a final judgment. As is stated in 10 Cyclopedia of Federal Procedure (2nd Ed.) Sec. 4976:

> "It is the general rule that to give a state judgment or decree the requisite finality under the statute it must terminate the litigation between the parties on the merits of the case ***, and this is the rule as to a judgment of a state appellate court passing on a judgment of the court below ruling on a demurrer since while it may settle the law of the case on the pleadings, it has no finality if it leaves the cause in such condition that a new case can be made by pleading over or by other proceedings below."

In Missouri & Kansas Interurban Railway Co. v. City of Olathe, 222 U. S. 185, 56 L. Ed. 155, 32 Sup. Ct. 46, the Court states:

> "The record fails to disclose a final judgment. The Supreme Court affirmed the judgment of the lower court, but this merely sustained the demurrer without dismissing the suit. The Supreme Court did not direct its dismissal, but the cause was left standing in the court below for such proceedings as might be had according to law after the decision on the demurrer, either by amendment of the petition or entry of final judgment."

See also Werner v. City Council of Charleston, 151 U. S. 360, 38 L. Ed. 192, 14 Sup. Ct. 356; Clark v. City of Kansas City, 172 U. S. 334, 43 L. Ed. 467, 19 Sup. Ct. 207.

II.

The petition does not state a cause of action since it does not allege that petitioner was unable to employ counsel, or that he requested the court to appoint counsel, which is necessary under the statutes of Missouri before the Court is required to appoint counsel.

(A) **The Sixth Amendment of the Federal Constitution does not apply to the States.**

(B) **Since the allegations in the petition do not state grounds sufficient to require the allowance of counsel under the Missouri statute the court was justified in ruling that the petition does not state a cause of action. Any question as to the constitutionality of the Missouri Statutes cannot be decided here since the petitioner did not raise it in the state court and the state court therefore, did not have an opportunity to pass on it.**

The petitioner does not allege that he was unable to employ counsel nor would any facts in the petition lead to that inference. Nor does he allege that he requested the Court to appoint counsel.

Sec. 4003 R. S. Missouri, 1939, provides:

> "If any person about to be arraigned upon an indictment for a felony be without counsel to conduct his defense, and be unable to employ any, it shall be the duty of the court to assign him counsel, at his request, not exceeding two, who shall have free access to the prisoner at all reasonable hours."

It must be noted that the statute specifically requires that the defendant be unable to employ counsel and that he request the court to appoint counsel for him before the court is obliged to so do.

In State v. Terry, 201 Mo. 697, 100 S. W. 432, the court at page 701 states:

> "It will be noticed from this statute that three things are necessary to be found by the trial court before appointing or assigning counsel for a defendant charged with felony. First, that the defendant is without counsel, second, that he is unable to employ counsel, third, that the defendant has requested that counsel be appointed for him. This record does not show that defendant requested the court to appoint counsel for him, but it does disclose that the court found that he was able to employ counsel. Defendant being able to employ counsel it was not the duty of the court to appoint counsel for him, even though he had requested it. * * *
>
> "An attorney appointed by the court to defend a person charged by indictment or information with a felony renders his service without any compensation therefor, and it is only when the defendant is unable to employ counsel and makes the necessary request, that it becomes the duty of the court to assign him counsel. It would manifestly be an injustice to require an attorney to defend without compensation a person under indictment or information for felony when such person is able to employ counsel, or to force counsel on the defendant without his consent. Occasionally the accused prefers to conduct his own defense rather than employ counsel or have the court appoint counsel for him."

In State v. Steelman, 318 Mo. 628, 300 S. W. 743, the court states:

> "While as above indicated it is shown by the record in this case that appellant was without counsel, and also that he requested the court to appoint counsel for him, the record fails to show *that he was unable to employ counsel.* * * * Being able to employ counsel it was not the duty of the court to appoint counsel for him even though he did request it."

See also Skiba v. Kaiser, 178 S. W. (2d) 373.

(A) Petitioner alleges that the failure of the court to assign him counsel was a denial of due process of law under the Fourteenth Amendment of the Constitution of the United States. He does not allege that it is a violation of the 6th Amendment of the Federal Constitution. This amendment has been held not to apply to the states.

In Betts v. Brady, 316 U. S. 455, 62 S. Ct. 1256, 86 L. Ed. 1595, the court states:

> "Was the petitioner's conviction and sentence a deprivation of his liberty without due process of law in violation of the Fourteenth Amendment because of the court's refusal to appoint counsel, at his request? The Sixth Amendment of the National Constitution applies only to trials in federal courts. The one process clause of the Fourteenth Amendment does not incorporate as such the specific guarantees found in the Sixth Amendment although a denial by a state of rights or privileges specifically embodied in that and others of the first eight amendments may in certain circumstances, or in connection with other elements, operate in a given case, to deprive the litigant of due process of law in violation of the Fourteenth. Due process of law is secured against invasion by the Federal government by the Fifth Amendment and is safeguarded against state action in identical words by the Fourteenth. The phrase formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may in one setting constitute a denial of fundamental fairness shocking to the universal sense of justice may in other circumstances and in the light of other considerations fall short of such denial."

The court after a review of the various state constitutional and statutory provisions states:

"This material demonstrates that in the great majority of the states it has been the considered judgment of the people, their representatives and their courts, that appointment of counsel is not a fundamental right essential to a fair trial. On the contrary the matter has generally been deemed one of legislative policy. In the light of this evidence we are unable to say that the concept of due process incorporated in the Fourteenth Amendment obligates the states, whatever may be their own views to furnish counsel in every such case. Every court has power if it deems proper to appoint counsel where that course seems to be required in the interest of fairness"

The case here is much stronger than the case of Betts v. Brady, supra, since here the petitioner does not allege that he was unable to employ counsel or that he requsted counsel. In the Brady case it was admitted that the petitioner was unable to employ counsel. This was also the case in Powell v. Alabama, 287 U. S. 45, 77 L. Ed. 158, 53 S. Ct. 55. There the petitioner was not only indigent and ignorant but the surrounding circumstances of the trial and the record of the trial itself showed that it was conducted in disregard of every principle of fairness, and in disregard of that which was declared by the law of the state a requisite of a fair trial.

Petitioner here not only does not allege that he was unable to employ counsel, he also does not present any facts which would show that he was denied a fair trial. There are no allegations of unfairness or ignorance on his part, or that he wasn't guilty. He doesn't allege any prejudice or partiality on the part of the court. The information charges him with murder in the first degree. No facts are alleged which would imply that he failed to understand the charge or didn't realize what he was doing when he pled guilty to it.

(B) The petitioner states that he was convicted without due process of law since he was without counsel. However, he does not state facts sufficient to bring him within

the Missouri Statutes which would have required the court to appoint counsel for him. Due process of law under the Missouri Statute would have required the court to appoint counsel only

(1) Where the defendant was without counsel.
(2) Where he was unable to employ counsel.
(3) Where he requested counsel.

Petitioner did not challenge the constitutionality of the Missouri statute, (Sec. 4003 R. S. Mo. 1939, quoted supra), in his petition for habeas corpus. The Supreme Court of Missouri therefore did not have an opportunity to rule on it and it is therefore submitted that the court here on certiorari cannot consider the constitutionality or unconstitutionality of Sec. 4003 R. S. Mo. 1939.

It has been held on numerous occasions that in order to give the Supreme Court jurisdiction to review a judgment which the highest court of a state has rendered in favor of the validity of a statute or an authority exercised under a state, the validity of the statute or authority must have been drawn in question on the ground of their being repugnant to the Constitution, laws, or treaties of the United States. When no such ground has been presented to or considered by the courts of the states the federal Supreme Court has no jurisdiction.

28 U. S. C. A. Sec. 344, Miller v. Cornwall R. Co. 168 U. S. 131, 18 S. Ct. 34, 42 L. Ed. 409; Columbia Water Power Co. v. Columbia Electric St. Ry., 172 U. S. 475, 19 S. Ct. 247, 43 L. Ed. 521; Green v. Frazier, 253 U. S. 233, 40 S. Ct. 499, 64 L. Ed. 878; Coleman v. Miller, 59 S. Ct. 972, 307 U. S. 433, 83 L. Ed. 1385.

III.

Petitioner pled guilty to the charge in the state courts and did not take an appeal. He could have raised the question of denial of counsel on appeal. Habeas corpus does not take the place of a writ of error or appeal.

The question of denial of counsel could have been raised and decided in Missouri by an appeal. Such was the case in the decisions quoted supra. State v. Terry, 201 Mo 697, State v. Steelman, 318 Mo. 628. See also State v. Moore, 121 Mo. 514, 26 S. W. 345; State v. Zumbunson, 13 Mo. A. 592.

Petitioner did not take an appeal. No extraordinary or unusual circumstances are here alleged that would excuse petitioner's failure to have recourse to the ordinary procedure afforded for review by the State of Missouri.

It is well settled by numerous decisions in both the state and federal courts that habeas corpus does not take the place of a writ of error or appeal.

Ex parte Conrades, 85 S. W. 160, 185 Mo. 411;
Ex parte Leach, 130 S. W. 394, 149 Mo. App. 317;
Ex parte Coder, 44 S. W. (2d) 179, 226 Mo. App. 479;
State ex rel. Walker v. Dobson, 36 S. W. 238, 135 Mo. 1;
In re Edwards (C. C. A. Mo.), 106 Fed. 537;
Forthoffer v. Swope (C. C. A. Wash.), 103 Fed. 707;
Ex parte Novotny, 88 Fed. 72;
Ex parte Craig, 282 F. 138, affirmed 44 S. Ct. 103, 263 U. S. 255, 68 L. Ed. 293;
Valentina v. Mercer, 26 S. Ct. 368, 201 U. S. 131, 50 L. Ed. 303;
Riggins vs. U. S. 26 S. Ct. 147, 199 U. S. 547, 50 L. Ed. 303.

Petitioner not only could have had this matter directly passed on by appeal in the State Court, but if that court had affirmed the judgment he could have taken the matter up by writ of error, appeal or certiorari to the U. S. Supreme Court *directly* from the decision on the *appeal* in the State court.

As was stated in Reid v. Jones, 23 S. Ct. 89, 187 U. S. 153, 47 L. Ed. 116:

"• • • One convicted in a state court for an alleged violation of the criminal statutes of the state and who contends that he is held in violation of the Constitution

of the United States must ordinarily first take his case to the highest court of the state in which the judgment could be reviewed and thence bring it, if unsuccessful there, to this court by writ of error; that only in certain exceptional cases of which the present is not one, will a circuit court of the United States or this Court on appeal from a Circuit Court, intervene by writ of habeas corpus in advance of the final action by the highest court of the state."

In ex parte Hawk, 64 S. Ct. 448, the court states:

"Ordinarily an application for habeas corpus by one detained under a state court judgment of conviction for a crime will be entertained by a federal court only after all state remedies available, including all appellate remedies in the state court and in this court by appeal or writ of certiorari have been exhausted."

See also Ex Parte, Whitacre, 17 Fed. (2d) 767; Urquhart vs. Brown, 205 U. S. 179, 27 S. Ct. 459, 51 L. Ed. 760.

CONCLUSION.

It is therefore respectfully submitted that the Supreme Court of Missouri was justified in denying the issuance of the writ of habeas corpus on the ground that the petition did not state a cause of action and that therefore the writ of certiorari should be quashed.

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For Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 64.—October Term, 1944.

O. C. Tomkins, Petitioner, *vs.* The State of Missouri. } On Writ of Certiorari to the Supreme Court of the State of Missouri.

[January 8, 1945.]

Mr. Justice Douglas delivered the opinion of the Court.

This case is a companion case to *Williams* v. *Kaiser*, No. 102, decided this day. It, too, is a petition for a writ of *habeas corpus* here on certiorari to the Missouri Supreme Court. It is alleged in the petition that petitioner in 1934 was charged with murder in the first degree, pleaded guilty to the charge, and was convicted and sentenced to the state penitentiary for life where he is presently confined. The petition was filed in 1944. The other salient facts alleged are as follows:

"The petitioner states that in the proceedings in said Circuit Court of Pemiscot County, Missouri, he was not represented by counsel, the Court did not make an effective appointment of counsel, the petitioner did not waive his constitutional right to the aid of counsel, and he was ignorant of his right to demand counsel in his behalf, and he was incapable adequately of making his own defense."

And he contends that he was deprived of counsel contrary to the requirements of the due process clause of the Fourteenth Amendment. Here, as in the *Williams* case, the Supreme Court of Missouri allowed petitioner to proceed *in forma pauperis* but denied the petition for the reason that it "fails to state a cause of action". The petition for *habeas corpus* was denied without requiring the State to answer or without giving petitioner an opportunity to prove his allegations. And the allegations contained in the petition do not appear to be inconsistent with the recitals of the certified copy of the sentence and judgment which accompanied the petition and under which petitioner is confined. Hence, we must assume here, as in the *Williams* case, that the allegations of the petition are true.

Powell v. *Alabama*, 287 U. S. 45, 71, held that at least in capital cases "where the defendant is unable to employ counsel, and is

incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law". Under that test a request for counsel is not necessary.[1] One must be assigned to the accused if he is unable to employ one and is incapable adequately of making his defense.

The petition is not drawn with the desirable precision and clarity. But we can hardly demand of a layman and pauper who draws his petition behind prison walls the skill of one trained in the law. If we were to take that course, we would compound the injury caused by the original denial of counsel. A deprivation of the constitutional right of counsel should not be readily inferred from vague allegations. But where the substance of the claim is clear, we should not insist upon more refined allegations than paupers, ignorant of their right of counsel and incapable of making their defense, could be expected to supply.

If this petition is read in that light, it satisfies the requirements of *Powell* v. *Alabama*. One who was not represented by counsel, who did not waive his right to counsel and who was ignorant of his right to demand counsel is one of the class which the rule of *Powell* v. *Alabama* was designed to protect. Certainly when we read these allegations with the further assertion in the record that petitioner was at no time prior to conviction allowed to consult with an attorney, the conclusion is irresistible that petitioner was unable to employ counsel either because he was without funds or because he was deprived of the opportunity.

The nature of the charge emphasizes the need for counsel. Under Missouri law one charged with murder in the first degree may be found guilty of that offense, of murder in the second degree, or of manslaughter. Rev. Stat. 1939, §§ 4376, 4844. The punishments for the offenses are different. §§ 4378, 4391. The differences between them are governed by rules of construction meaningful to those trained in the law but unknown to the average layman.[2] The defenses cover a wide range.[3] And the in-

[1] As noted in the *Williams* case, the Missouri statute governing the appointment of counsel (Rev. Stat. 1939, § 4003) employs the language "arraigned upon an indictment for a felony". The prosecution in this case was upon an information. But it seems that the Supreme Court of Missouri applies the statute in that situation as well. See State v. Terry, 201 Mo. 697; State v. Steelman, 318 Mo. 628.

[2] In State v. Burrell, 298 Mo. 672, 680, it was held that "where there is willful killing with malice aforethought, that is, with malice and premedita-

gredients of the crime of murder in the first degree as distinguished from the lesser offenses are not simple but ones over which skilled judges and practitioners have disagreements.[4] The guiding hand of counsel is needed lest the unwary concede that which only bewilderment or ignorance could justify or pay a penalty which is greater than the law of the State exacts for the offense which they in fact and in law committed.

Here, as in the *Williams* case, the allegations of the petition may turn out to be wholly specious. But they are sufficient to establish a *prima facie* case of deprivation of the constitutional right. The other objections raised by Missouri have been answered in our opinion in the *Williams* case.

Reversed.

Mr. Justice ROBERTS and Mr. Justice FRANKFURTER think the writ should be dismissed for the reasons set forth in their dissent in *Williams* v. *Kaiser*, No. 102.

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tion, but not deliberation, or in a cool state of blood, the offense is murder in the second degree. Nor can any homicide be murder in the second degree unless the act causing death was committed with malice aforethought, that is, with malice and premeditation. Where there is a willful killing without deliberation and not with malice aforethought, the offense is manslaughter."

[3] Self-defense and insanity are defenses. Rev. Stat. 1939, § 4049. Justifiable or excusable homicide is a defense (*id.* § 4381) as those terms are defined. *Id.* §§ 4379, 4380.

[4] "The law presumes the killing was murder in the second degree, in the absence of proof of attendant circumstances which tend to raise the killing to murder in the first degree or to reduce it to manslaughter." State v. Henke, 313 Mo. 615, 638. As to the necessity on certain evidence to give instructions on a lesser offense than murder in the first degree, see State v. Warren, 326 Mo. 843; State v. Wright, 337 Mo. 441; State v. Jackson, 344 Mo. 1055.